

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DYNAMITE SALAVEA,

Plaintiff,

vs.

JEFFERY UTTECHT, MARK KUCZA
and DEPARTMENT OF
CORRECTIONS,

Defendants.

NO. CV-08-5057-LRS

ORDER DISMISSING FIRST AMENDED
COMPLAINT WITHOUT PREJUDICE

Plaintiff, a prisoner at the Washington State Penitentiary, filed *pro se* and *in forma pauperis* a civil rights complaint pursuant to 42 U.S.C. § 1983 in the Western District of Washington. Following amendment of the complaint, the First Amended Complaint was transferred to this District where it was received on September 3, 2008.

By Order filed September 8, 2008, the court directed Mr. Salavea to show cause why his First Amended Complaint, alleging incidents on June 26, 2008, should not be dismissed for failure to exhaust administrative remedies prior to Mr. Salavea initiating this action in the Western District by documents signed June 24, 2008. Plaintiff did not comply and has filed nothing further in this action.

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ORDER DISMISSING FIRST AMENDED COMPLAINT WITHOUT PREJUDICE -- 1

1 A prisoner may not bring any suit with respect to prison
2 conditions "until such administrative remedies as are available are
3 exhausted" (42 U.S.C. § 1997e(a)). Exhaustion must precede the filing
4 of the complaint and compliance with the statute is not achieved by
5 satisfying the exhaustion requirement during the course of an action.
6 *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002).

7 Exhaustion is ordinarily an affirmative defense. *Wyatt v.*
8 *Terhune*, 315 F.3d 1108 (9th Cir. 2003). However, where it is clear
9 from the face of Mr. Salavea's documents that he could not have fully
10 exhausted his grievances prior to initiating this action on June 24,
11 2008, dismissal is appropriate. See *Jones v. Bock*, 549 U.S. 199, ___,
12 127 S.Ct. 910, 921 (2007), citing with approval, *Leveto v. Lapina*, 258
13 F.3d 156, 161 (3rd Cir. 2001) ("[A] complaint may be subject to
14 dismissal under Rule 12(b)(6) when an affirmative defense ... appears
15 on its face" (internal quotation marks omitted)).

16 Having failed to show cause why this action should not be
17 dismissed, **IT IS ORDERED** Plaintiff's First Amended Complaint is
18 **DISMISSED without prejudice** for failure to exhaust administrative
19 remedies.

20 **IT IS SO ORDERED.** The District Court Executive is directed to
21 enter this Order, enter judgment, forward a copy to Plaintiff at his
22 last known address and close the file.

23 **DATED** this 3rd day of October, 2008.

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25 **s/Lonny R. Suko**

26 _____
27 LONNY R. SUKO
28 UNITED STATES DISTRICT JUDGE